Petition

81-466

No. _____

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In the Supreme Court of the United States

OCTOBER TERM, 1981

JAMES L. SONTAG, ATTORNEY AT LAW
Petitioner

v.

THE STATE OF OKLAHOMA
Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE OKLAHOMA COURT OF CRIMINAL APPEALS

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QUESTION PRESENTED

Whether, notwithstanding the prohibition of involuntary servitude in the Thirteenth Amendment to the United States Constitution, a private attorney can be commanded to unwillingly represent an indigent, subject to being jailed and/or fined for contempt of court should he refuse.

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No. _____

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v.

THE STATE OF OKLAHOMA
Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE OKLAHOMA COURT OF CRIMINAL APPEALS

James L. Sontag, Attorney at Law, by his undersigned counsel, petitions this Honorable Court for a Writ of Certiorari to the Oklahoma Court of Criminal Appeals to review its opinion affirming Petitioner's conviction for contempt of court for Petitioner's refusal to comply with an order directing him to represent an indigent criminal defendant against his will.

OPINION BELOW

The opinion of the Oklahoma Court of Criminal Ap-

peals is reported at 629 P.2d 1269 (Okl.Cr., 1981) and is printed in Appendix A hereto, *infra,* p. 1a.

JURISDICTION

The opinion of the Oklahoma Court of Criminal Appeals was entered on June 3, 1981 and was actually filed on June 4, 1981. No Petition for Rehearing was filed. This Court has jurisdiction to review the opinion below by Writ of Certiorari pursuant to 28 U.S.C. §1257(3).[1]

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

1. U.S. Constitution, Amendment XIII.

> "Neither slavery nor involuntary servitude, except as punishment for crime whereof the parties shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction."

2. 22 Okla. Stat. §464.

> "Counsel, right to before arraignment – Compensation: If the defendant appears for arraignment, without counsel, he must be informed by the court that it is his right to have counsel before being arraigned, and must be asked if he desires the aid of counsel. If he desires and is financially unable to employ

[1] Contempt being quasi-civil and quasi-criminal, Petitioner acknowledges that, to the extent that the contempt conviction is deemed criminal, the petition is untimely. The untimeliness, however, is not jurisdictional in a criminal case. *Sanabria v. United States,* 437 U.S. 54, 57 LEd2d 43, 98 S.Ct. 2110 (1978)

counsel, the court must assign counsel to defend him. The attorney so appointed shall represent said person in the examining magistrate court until he is discharged or bound over by said court and shall receive such compensation as is ordered by the court, not to exceed One Hundred Dollars ($100.00) as approved by a Judge of the District Court. Provided, that in all counties of the State having a city therein of over one hundred thousand (100,000) and less than two hundred twenty-five thousand (225,000) population, according to the last preceding regular Federal Decennial Census, a majority of the District Judges, sitting regularly in said county, shall appoint not to exceed two (2) duly qualified and practicing attorneys to act as counsel in all such cases, who shall serve in such capacity during the tenure of the Judges making such appointment, or until sooner termination thereof by a majority vote of said District Judges. Each of the attorneys so appointed shall receive for such services the sum of Two Hundred Dollars ($200.00) per month, One Hundred Dollars ($100.00) thereof to be paid by the county in which said appointment is made, and One Hundred Dollars ($100.00) thereof to be paid out of the court fund of said county, together with an amount not to exceed Fifty Dollars ($50.00) each per month, out of the court fund, of said county, together with an amount not to exceed Fifty Dollars ($50.00) each per month, out of the court fund, in payment of expenses incurred for transportation, com-

munications, investigations, transcripts and secretarial hire, and shall be precluded from appearing as counsel in any and all other criminal actions."

3. 22 Okla. Stat. 1271.

"In all criminal cases triable in the State of Oklahoma, where it is satisfactorily shown to the court that the defendant has no means and is unable to employ counsel, the court shall, in all cases, where counsel is appointed and assigned for defense, allow and direct to be paid by the county in which such trial is had, out of the court fund of said county, a reasonable and just compensation to the attorney or attorneys so assigned for such services as they may render, such compensation being allowable in any court of record. The attorney shall not be paid a sum to exceed Five Hundred Dollars ($500.00) in any one case, the specific amount to be left to the discretion of the presiding judge. In any county in which a public defender is regularly employed, the court shall appoint such public defender to act as counsel for the defendant. If two or more indigent defendants are charged conjointly, and the public defender cannot justly defend both, the court may appoint and compensate counsel as provided above."

4. U.S. Constitution, Amendment V.

"No person shall . . . be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without due process of law; nor shall

private property be taken for public use, without just compensation."

5. U.S. Constitution, Amendment VI.

"In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of counsel for his defense."

STATEMENT OF CASE

James L. Sontag, Attorney at Law, is a licensed and practicing member of the Oklahoma Bar Association. On August 31, 1979, Mr. Sontag received a call from the court clerk of Nowata County, Oklahoma, informing him that District Judge Arthur J. Boose had appointed him to serve as defense counsel for Terry D. Blankenship, an indigent defendant in three criminal cases. Mr. Sontag appeared before Judge Boose and announced that he was compelled to decline the appointment. Judge Boose then informed Mr. Sontag the appointment was in the form of an order, which he was not free to decline. Mr. Sontag then respectfully informed the Court that he would nevertheless decline the appointment, which he felt relegated him to becoming a "servant of the court fund." The Court acknowledged his appreciation of Mr. Sontag's opposition but nevertheless found him in contempt and imposed a fine of One Hundred Dollars ($100.00). Mr. Sontag filed a Motion For New Trial, in which the only assignment of error was the conflict between the Court's directive and the Thirteenth Amendment to the U.S. Constitution. The

Motion For New Trial was overruled the same day and a timely appeal was perfected. On June 3, 1981 the conviction was upheld.

WHERE FEDERAL QUESTIONS FIRST RAISED

Mr. Sontag initially raised the question of involuntary servitude orally when he informed the Court he was declining the "appointment." The question was again raised in the Motion For New Trial, which under Oklahoma practice defines the issues on appeal. The question was next presented to the Oklahoma Court of Criminal Appeals.

ARGUMENT FOR ALLOWANCE OF THE WRIT

This case meets the Rule 17 considerations governing granting of the Writ.

Significance of Question

The question presented is of national scope, in that every state and federal judicial system in the United States and its territories is presently confronted with the constitutional obligation to provide counsel for indigent criminal defendants. Considering that approximately twenty-five percent of all criminal defendants are indigent, the financial consequences of meeting this obligation are significant. Many jurisdictions have endeavored to minimize the cost per defendant by utilizing salaried public defenders. Others utilize the services of private counsel and compen-

sate them at prevailing market rates. Most jurisdictions have successfully avoided the financial burdens of providing counsel for indigents by imposing those burdens upon members of the bar. Pursuant to long-standing tradition, private attorneys are "appointed" to represent indigents for little or no compensation. Probably due to tradition and ethical obligation, attorneys have accepted such appointments readily; conversely, when an attorney offers any reasonable cause for declining such an appointment, the judiciary has been accomodating and an alternative appointment is made. However, under such a system, the potential for a clash has always existed. In the present instance, Petitioner declined the appointment because he felt the burden of these appointments was becoming unreasonable. The trial jduge disagreed and the "appointment" became a command. Petitioner resisted a command that he perform servitude involuntarily and was held in contempt.

Thus, the issue presented strikes to the very heart of the constitutional prohibition of involuntary servitude. The Petitioner has been commanded to perform work for the benefit of the government against his will, or face punishment for his refusal.

Sharp conflict exists among the several states, the federal courts of appeal and the federal district courts as to whether or not the compulsory representation of indigents by private attorneys violates the prohibition

against involuntary servitude, or other constitutional provisions. This Honorable Court has never settled the issue here presented.

A further consideration favoring the granting of this Petition is the rapid evolution now taking place in this field of law. Although the Sixth Amendment has guaranteed the right to counsel since the birth of this nation, it was not until 1963 that the right of an indigent to an attorney at state expense was even recognized. Since then, a multitude of decisions have expanded that right to include every significant stage of criminal proceedings, and numerous quasi-criminal proceedings in which valuable rights are at stake. Similarly, it was originally believed that attorneys, being designated "officers of the court" entered the practice subject to some sort of obligation to represent indigents without compensation at the request of the judiciary. Gradually, through court decisions and/or statutory enactments, compensation is now the rule rather than the exception, although compensation is generally well below market rates.

Three states have held for over one hundred years that constitutional limitations prohibit the drafting of private attorneys to represent indigents without compensation. Indiana, Iowa and Wisconsin have maintained that attorneys representing indigents are entitled to reasonable compensation on federal consitutional grounds. More recently, a number of other states are beginning to speak

of the right of attorneys to be compensated for indigent representation in terms like "confiscatory" and "involuntary servitude." Where the courts have failed to act, the legislatures have stepped in to provide for reasonable compensation.

In *United States v. Leser,* 232 F.Supp. 535 (S.D.Cal, 1964), a federal district judge proclaimed:

> "This court has no more power to compel a member of the bar of the State of California to do the tremendous amount of work and put in the tremendous amount of time it would require to conscientiously examine the files and records in this case and represent these defendants on appeal, and thus compel *involuntary servitude* by a lawyer to convicted criminals, than I have to make an order compelling these defendants, had they not been convicted to pick cotton for a private individual." (emphasis added)

A further reason for granting the Writ is the desirability of reviewing, and passing upon the propriety of, the methodology of the Oklahoma Court of Criminal Appeals in affirming Petitioner's conviction, wherein the Court of Criminal Appeals found a waiver of fundamental constitutional rights to have occurred *by implication,* with no more notice than the supposed awareness of applicants for admission to the practice of law of, " . . . the traditions of the profession which he is joining and to know that one of these traditions is that a lawyer is an officer of the court, obligated to represent indigents for little or no compensa-

tion, upon court order." The inadequacy of such notice to support an imlied waiver of a fundamental right is readily apparent. Further, from the reasoning of the court below it would apparently follow that one is ineligible for admission unless the constitutional protection against involuntary servitude is waived irrevocably by an applicant for admission to the practice.

CONCLUSION

It is respectfully submitted that certiorari should be granted in this case. This is the right time for this Court to speak upon the issue presented and this is a most appropriate case, since the issues were carefully limited to those encompassed by the Thirteenth Amendment, in anticipation of this Petition being submitted following affirmation by the Court of Criminal Apeals of the State of Oklahoma. Hopefully, upon granting of certiorari and a full consideration of the issue presented, the right of every American attorney to be free of involuntary servitude will be vindicated and no lawyer will ever be forced to choose between being an unwilling servant of the government or an inmate in one of its jails.

Respectfully submitted,

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APPENDIX A

IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

Authorized for Filing
JUN 3, 1981
Court of Criminal Appeals

FOR PUBLICATION

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SUPREME COURT
State of Oklahoma
JUN 4, 1981
ROSS N. LILLARD, JR.
Clerk

No. M-79-715

JAMES L. SONTAG
Appellant

v.

THE STATE OF OKLAHOMA
Appellee

OPINION

BUSSEY, Judge:

James L. Sontag, hereinafter referred to as the appellant, is a licensed and practicing member of the Oklahoma Bar, and was directed to serve as legal counsel for Terry Blankenship. Mr Blankenship had been charged with a crime in Nowata County and was indigent, necessitating the services of court-appointed counsel. The court, pursuant to 22 O.S. 1971, §464,[1] informed the appellant that he would be appointed to represent the defendant,

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[1] (See Appendix One, attached.)

Blankenship, in the matter, to which the appellant respectfully informed the court that he would have to decline to accept. When the court informed counsel that the appointment was an order, counsel again declined the appointment, and was informed by the court that he was in violation of the order. As a result, the appellant was found to be in direct contempt of court and was assessed a one hundred dollar ($100.00) fine.

The appellant has appealed, contending that the conviction for direct contempt of court is invalid. This contention is premised upon the fact that the order imposes involuntary servitude, prohibited by the Thirteenth Amendment to the United States Constitution. Further, the appellant takes the position that 5 O.S. 1971, §§2, 3 do not require attorneys to submit themselves to compulsory indigent appointments and that the Sixth Amendment rights of an indigent defendant can be protected and upheld without appointing an unwilling attorney to represent a defendant.

None of these contentions are new. Similar claims have withstood attack on grounds that indigent representation assignments constitute involuntary servitude, take private property for public use without just compensation, take property without due process of law and deny equal protection under the law. Essentially the same claims have been rejected in a number of jurisdictions, including Oklahoma. See *Bias v. State,* 568 P.2d 1269 (Okl. 1977);

Tyler v. Lark, 472 F.2d 1077 (8th Cir. 1973); *Dolan v. United States,* 351 F.2d 671 (5th Cir. 1965); *United States v. Dillon,* 346 F.2d 633 (9th Cir. 1965), cert. denied 382 U.S. 978, 86 S.Ct. 550, 15 L.Ed.2d 469; *People v. Harflinger,* 45 Illinois Appellate 3rd 479, 359 N.E.2d 864 (1977); *Louisiana v. Doucet,* 352 S.2d 222 (La. 1977); *State ex rel. Partain v. Oakley,* 227 S.E.2d 318 (W.Va. 1976); *Lindh v. O'Hara,* 325 A.2d 84 (Del. 1974); *Daines v. Markoff,* 555 P.2d 493 (Nev. 1976); *Jackson v. State,* 413 P.2d 488 (AK. 1966); *Weiner v. Fulton County,* 113 Ga. Appellate 343, 148 S.E.2d 143 (1966); *Warner v. Commonwealth,* 400 S.W.2d 209 (Ky. 1966); *State v. Clifton,* 247 La. 495, 172 S.2d 657 (1965); *State v. Rush,* 46 N.J. 399, 217 A.2d 441 (1966); *Ruckenbrod v. Mullins,* 102 UT. 548, 133 P.2d 325 (1943); *Presby v. Klickitat County,* 5 Wash. 329, 31 P.876 (1892); *People ex rel. Conn. v. Randolph,* 35 Ill. 2d 24, 219 N.E.2d 337 (1966).

As set forth in *United States v. Dillon,* supra, and noted in a great many of the cases heretofore cited, the 9th Circuit stated:

> ' . . . the obligation of the legal profession to serve indigents on court order is an ancient and established tradition, and * * * appointed counsel have generally been compensated, if at all, only by statu-tory fees which would be inadequate under just compensation principles, and which are usually payable only in limited types of cases. Further, * * * the vast majority of the courts which have passed on the

question have denied claims of appointed counsel for non-statutory just compensation, pointing out that representation of indigents under court order, without a fee, is a condition under which lawyers are licensed to practice as officers of the court, and that the obligation of the legal profession to serve without compensation has been modified only by statute. An applicant for admission to practice law may justly be deemed to be aware of the traditions of the profession which he is joining and to know that one of these traditions is that a lawyer is an officer of the court, obligated to represent indigents for little or no compensation, upon court order. Thus, the lawyer has consented to, and assumed, this obligation and when he is called upon to filfill it, he cannot contend that it is a: "'taking of services'". *C.F. Kunhardt and Co., Inc. v. United States,* 266 U.S. 537, 45 S.Ct. 158, 69 L.Ed. 428 (1925)."

In 1969, in Legal Ethics Opinion No. 256, 40 O.B.J. 1797, it was determined to be unethical for lawyers to refuse to represent indigents in criminal matters without justifiable excuse when so appointed by the court. Further, in no case is an attorney within this jurisdiction appointed to represent an indigent in a criminal matter without statutory compensation.[2] As recognized by our

[2] (See Appendices two, three and four, attached.)

Supreme Court and determined in *Bias v. State,* supra, those statutes which provide for the appointments of indigent representation are not unconstitutional on their face. Extraordinary and additional expenses incurred in the representation of an indigent defendant are items for which the attorney may be compensated and reimbursed. Based on the foregoing, we are of the opinion that the appointment by the District Court of Nowata County of Mr. James Sontag to represent the indigent criminal defendant was not a violation of the Thirteenth Amendment of the United States Constitution, imposing involuntary servitude, and we so hold. Inasmuch as it is the appellant's contention that the judgment of the court for contempt was invalid for the sole reason that the court was without authority to impose on him the representation appointment, we likewise uphold the judgment and sentence of the trial court. 21 O.S. 1971, §566.

AN APPEAL FROM THE DISTRICT COURT OF NOWATA COUNTY, OKLAHOMA THE HONORABLE ARTHUR J. BOOSE, JUDGE

JAMES L. SONTAG, appellant, was convicted for Direct Contempt of Court in Nowata County District Court, Case No. CRF-79-56, was sentenced to a fine of one hundred ($100.00) dollars, and appeals. AFFIRMED.

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OPINION BY BUSSEY, J.
BRETT, P. J., CONCURS
CORNISH, J., CONCURS

APPENDIX ONE

Title 22 O.S. 1971, §464 provides:

If the defendant appear for arraignment, without counsel, he must be informed by the court that it is his right to have counsel before being arraigned, and must be asked if he desires the aid of counsel. If he desires and is financially unable to employ counsel, the court must assign counsel to defend him. The attorney so appointed shall represent said person in the examining magistrate court until he is discharged or bound over by said court and shall receive such compensation as is ordered by the court, not to exceed One Hundred Dollars ($100.00) as approved by a Judge of the District Court. Provided, that in all counties of the State having a city therein of over one hundred thousand (100,000) and less than two hundred twenty-five thousand (225,000) population, according to the last preceding regular Federal Decennial Census, a majority of the District Judges, sitting regularly in said county, shall appoint not to exceed two (2) duly qualified and practicing attorneys to act as counsel in all such cases, who shall serve in such capacity during the tenure of the Judges making such appointment, or until sooner termination thereof by a majority vote of said District Judges. Each of the attorneys so appointed shall receive for such services the sum of Two Hundred Dollars ($200.00) per month, One Hundred Dollars ($100.00) thereof to be paid by the county in which said appointment is made, and One Hundred Dollars ($100.00) thereof to be paid out of the court fund of said county, together with an amount

not to exceed Fifty Dollars ($50.00) each per month, out of the court fund, in payment of expenses incurred for transportation, communications, investigations, transcripts and secretarial hire, and shall be precluded from appearing as counsel in any and all other criminal actions.

APPENDIX TWO

Laws 1979, ch. 238, §1, 22 O.S. Supp. 1980, §1271 provides:

> In all criminal cases triable in the State of Oklahoma, where it is satisfactorily shown to the court that the defendant has no means and is unable to employ counsel, the court shall, in all cases, where counsel is appointed and assigned for defense, allow and direct to be paid by the county in which such trial is had, out of the court fund of said county, a reasonable and just compensation to the attorney or attorneys so assigned for such services as they may render, such compensation being allowable in any court of record. The attorney shall not be paid a sum to exceed Five Hundred Dollars ($500.00) in any one case, the specific amount to be left to the discretion of the presiding judge. In any county in which a public defender is regularly employed, the court shall appoint such public defender to act as counsel for the defendant. If two or more indigent defendants are charged conjointly, and the public defender cannot justly defend both, the court may appoint and compensate counsel as provided above.

APPENDIX THREE

Title 21 O.S. 1971, §1074 provides:

Whenever the judge of any court of record within this state shall determine that any person convicted of a crime within his court is without adequate funds or resources to employ legal counsel for the perfection of an appeal, he shall upon request of said convicted person appoint counsel for appeal. Said counsel shall be provided adequate compensation, as fixed by the judge, from the court fund of the county in which the defendant was convicted. Provided, that in any county where a public defender is regularly employed, the judge making a determination of the necessity for counsel to prosecute an appeal shall, where feasible and justice will be served, appoint such public defender to act as such counsel for the defendant for such appeal, and may, if the circumstances justify, allow an additional compensation to such public defender upon the concurrence of a majority of the district judges, if more than one district judge.

APPENDIX FOUR

Laws 1976, 1st Ex.Sess., ch. 1, §8, 21 O.S. Supp. 1980, §701.13 provides:

> In all cases, wherein the defendant is subject to the death penalty triable in the State of Oklahoma, where it is satisfactorily shown to the trial court that the defendant has no means and is unable to employ counsel, the court shall, in all such cases, where counsel is appointed and assigned for defense, allow and direct to be paid from the State Judicial Fund, a reasonable and just compensation to the attorney so assigned for such services as they may render such compensation being allowable in any court of record. Provided, however, that such attorney shall not be paid a sum to exceed Two Thousand Five Hundred Dollars ($2,500.00) in any one case, the specific amount to be left to the discretion of the trial judge.

Opposition

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JAMES L. SONTAG,
Petitioner,

VERSUS

STATE OF OKLAHOMA,
Respondent.

On Petition for a Writ of Certiorari to the Court of Criminal Appeals of the State of Oklahoma

RESPONDENT'S BRIEF IN OPPOSITION

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November, 1981

QUESTION PRESENTED

Whether the involuntary servitude proscription of the Thirteenth Amendment of the United States Constitution forbids the appointment of a member of the bar to represent an indigent criminal defendant, where the attorney does not consent to accept the appointment?

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No. 81-466

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JAMES L. SONTAG,
Petitioner,

VERSUS

STATE OF OKLAHOMA,
Respondent.

On Petition for a Writ of Certiorari to the Court of Criminal Appeals of the State of Oklahoma

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

The respondent, The State of Oklahoma, comes before the Court by and through its attorney of record, Jan Eric Cartwright, Oklahoma Attorney General, and presents the following matters and grounds why the cause of the petitioner should not be reviewed by this Court.

The petitioner's description of the Opinion Below, the basis of this Court's jurisdiction, the constitutional and statutory provisions involved in the case, and his Statement of the Case are all fundamentally accurate and complete. They are, therefore, adopted by the respondent and incorporated into this Brief by reference.

REASONS WHY THE WRIT SHOULD BE DENIED

Although the precise question presented by the Petition has never been directly ruled upon in this forum, past rulings of this Court clearly foreclose the issue raised. The controlling case is *Butler* v. *Perry*, 240 U.S. 328 (1916), in which this Court recognized the existence of fields of service to the public which, by virtue of longstanding acceptance prior to the enactment of the Thirteenth Amendment, were intended to be exempt from its reach. The service of members of the bar upon appointment to represent indigent criminal defendants is clearly such a field and the *Butler* case, therefore, is dispositive of the petitioner's claim to a defense arising under the Thirteenth Amendment.

A defense substantially identical to that raised by the petitioner here was asserted in *Butler* to exist under the Thirteenth Amendment. The defendant had been charged and convicted of violating a Florida statute which required all male county residents to provide compulsory service on the public roads. Similar laws had existed in a number of states long before the adoption of the Thirteenth Amendment, dating back, even, to Roman times. In view of the historical antecedents of the road labor laws, this Court found that statutes requiring the involuntary performance of such services for the public welfare were excepted from operation of the Thirteenth Amendment. The conviction was, therefore, affirmed.

The reasoning of the Court in *Butler* is no less applicable to compulsory representation of indigents by lawyers than to compulsory work on roads by county residents:

> "This Amendment was adopted with reference to conditions existing since the foundation of our government, and the term 'involuntary servitude' was intended to cover those forms of compulsory labor akin to African slavery which, in practical operation, would tend to produce like undesirable results. It introduced no novel doctrine with respect of services always treated as exceptional, and certainly was not intended to interdict enforcement of those duties which individuals owe to the state, such as services in the army, militia, on the jury, etc. The great purpose in view was liberty under the protection of effective government, not the destruction of the latter by depriving it of essential powers." *Id.* 240 U.S., at 332-333.

There is no question that court appointments of counsel to serve indigents were a common form of public service long before the adoption of the Thirteenth Amendment to the United States Constitution, or even the Constitution itself. As early as the 17th Century, it was said that "if the Court assign . . . counsel, he ought to attend; and if he refuse . . . we would not hear him, nay, we would make bold to commit him." *Deakins* v. *Scroggs*, 1 Freeman 389, 89 Eng.Rep. 289 (Kings Bench, 1674).

In the American colonies, in Connecticut for example, it was the practice as early as 1750 for courts to appoint counsel for indigents, even without statutory or charter authority. *See* Zephaniah Swift, *A System of the Laws of Connecticut* (Windham, Conn. 1795), Book II, p. 392. In post-colonial times, yet long before the adoption of the Thirteenth Amendment, many states provided for appointment of counsel for indigents in at least some cases. New Jersey, for example, required courts, in all cases of indict-

ment, "to assign to such person, if not of ability to procure counsel, such counsel, not exceeding two, as he or she shall desire." Act of 1795, Acts of the General Assembly (New Jersey), 1791-1796, p. 1012.

The petitioner now contends, in effect, that the Thirteenth Amendment was meant to overturn a tradition of public service by the bar of some two centuries standing at the time the amendment was enacted. This cannot be. The reasoning of this Court in *Butler* simply does not permit such a result. Rather, it must be recognized that such service by attorneys is one of the traditional fields of public service which remains unaffected by the proscription of the Thirteenth Amendment. Similar exceptions have been recognized by lower courts, for example, in cases of military service, *United States* v. *Fallon*, 407 F.2d 621 (8th Cir. 1969), *cert. denied*, 395 U.S. 908 (1969), and service by merchant seamen, *Burke* v. *Mathiasen's Tanker Industries, Inc.*, 393 F.Supp. 790 (E.D. Pa. 1975).

The respondent realizes, of course, that the foregoing demonstration that the result reached below was correct and that the petitioner was fairly and justly treated, does not entirely dispose of the question of reviewability. If the lower courts were sharply divided on this issue as the petitioner asserts, then intercession by this Court to settle the question might be appropriate. However, no such "sharp conflict" exists and the few courts which have squarely faced the question raised here have rejected the position asserted by the petitioner, finding that the Thirteenth Amendment is no bar to court appointments of unwilling counsel to defend indigent criminal defendants. *See, e.g.*, *Weiner* v. *Fulton County*, 148 S.E.2d 143 (Ga. App. 1966); *State* v. *Rush*, 217 A.2d 441 (N.J. 1966).

The respondent has found only two cases where any court has expressed concern that the Thirteenth Amendment might bar the appointment of unwilling attorneys to represent indigents. The petition quotes a lengthy dictum from one of them. However, the Thirteenth Amendment issue was not properly before either such court, and both decisions were overturned on appeal. *See, United States* v. *Leser,* 233 F.Supp. 535 (S.D. Cal. 1964), *rev'd sub nom., Leser* v. *United States,* 355 F.2d 832 (9th Cir. 1964), and *Re Nine Applications for Appointment of Counsel in Title VII Proceedings,* 475 F.Supp. 87 (N.D. Ala. 1979), vacated *sub nom., White* v. *United States Pipe & Foundry Co.,* 646 F.2d 203 (5th Cir. 1981). The existence of these two district court decisions certainly provides no basis for the petitioner's bald assertion that any conflict exists in lower courts on the question here raised, nor do any other decisions found by the respondent.

The petition in this cause seeks to create a hitherto unrecognized tension between the mandatory right-to-counsel provisions of the Sixth Amendment of the United States Constitution and the provisions of the Thirteenth Amendment. Though the consequences of such an outcome to this case cannot be stated with certainty, it can be seen that the complications are potentially limitless. The damage to the orderly administration of criminal justice, especially in sparsely populated areas without public defender systems, could be devastating, with particular impact on the Sixth Amendment right of indigent defendants to court-appointed counsel.

However, such a result can and must be avoided. The historical circumstances of the Thirteenth Amendment con-

clusively demonstrate that the provision was never meant to interfere with the ability of courts to appoint counsel for indigents in criminal cases. Such service by attorneys must, therefore, be regarded as a proper obligation to the court, undertaken by anyone who seeks to serve as an officer of the court. This has been recognized by the few lower courts, including the Oklahoma Court of Criminal Appeals, which have had the question properly before them. There is, therefore, no basis for review by this Court.

CONCLUSION

For these reasons, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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